

Ali (Migration) [2019] AATA 1976 (24 May 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Ms Selveta Ali

VISA APPLICANTS: Mr Asmir Ametov
Miss Sara Ametov

CASE NUMBER: 1802412

DIBP REFERENCE(S): OSF2014060200

MEMBER: Mary Urquhart

DATE: 24 May 2019

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Statement made on 24 May 2019 at 10:07am

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner (Provisional)) – Federal Circuit Court remittal – genuine spousal relationship – credibility issues – inconsistent information – lack of probative evidence – inception and development of relationship – time spent together after marriage – knowledge of sponsor’s living arrangement – decision under review affirmed

1.

LEGISLATION

Migration Act 1958 (Cth), ss 5F, 65

Migration Regulations 1994 (Cth), r 1.15A; Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

2. This is an application for review of a decision made by a delegate of the Minister for Immigration on 29 May 2015 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
3. The first named visa applicant (the visa applicant) applied for the visa on 2 July 2014 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit who are applicants for the visa need satisfy only the secondary criteria.
4. The delegate refused to grant the visa on the basis that the applicants did not satisfy cl.309.211 and cl.309.221 because the delegate was not satisfied that the relationship between the applicant and sponsor was genuine and continuing. The applicant sought a review.
5. On 18 January 2017 the Tribunal (differently constituted) affirmed the delegate's decision. (Case number 1508547).
6. The parties applied for judicial review. On 22 January 2018 the Federal Circuit Court of Australia set aside the Tribunal's decision and remitted the matter to the Tribunal.
7. The review applicant appeared before the Tribunal on 23 May 2019 to give evidence and present arguments. The Tribunal also received oral evidence from Ms Jasminala Batto and from the applicant by telephone in Macedonia.
8. The applicant was assisted by an interpreter in the Bosnian and English languages. During the hearing the applicant responded off point to some questions and queries were raised concerning translation/interpretation. The Tribunal indicated its preparedness to adjourn the hearing if a different interpreter was required. The review applicant indicated that was not necessary saying the applicant spoke and understood Bosnian, had previously used a Bosnian interpreter and did not need the Bosnian interpreter replaced by a Macedonian interpreter.
9. Prior to the hearing the Tribunal received a submission which listed documentary evidence previously submitted in support of the application together with further documents including documents regarding communication between the parties, a statement by Mr Mirza Zukanovic, the sponsor's son, dated 21 April 2019, a document purporting to gift land to the applicant and the right to transfer it into his name and his wife's name dated 3 May 2019 and an ANZ Bank statement.(see all at Tribunal folio 140-219).
10. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

11. The issue in the present case is whether the visa applicant is the spouse of her sponsor as defined.

12. At the outset the Tribunal records that it found that there were significant credibility issues arising from inconsistent information and lack of probative evidence supporting the claims made by both the sponsor and the visa applicant in their oral evidence such as to give rise to a concern that the evidence has been exaggerated and or carefully fabricated for the purposes of the visa. Furthermore the Tribunal records it found the applicant and sponsor were not truthful witnesses in all matters.
13. The applicant is a 51 old citizen of the FYR of Macedonia. The applicant has previously been married and has a daughter from that marriage. She is the secondary applicant Ms Sara Ametov now 18 years of age. The evidence is that she has completed her schooling and hopes to work in the Beauty business. The balance of the applicant's family is in Australia including his mother, 3 sisters and his only brother. He has 1 remaining married sister in Macedonia. His father is deceased and another sister who lived in Germany has passed away.
14. The sponsor (review applicant) is 59 years of age. She was previously married to Mr Halil Zukanovic. The sponsor has three adult children. At the time of application, being 2 July 2014, the applicant claimed to have been employed with the Dandenong Council as a community care worker. At this hearing she gave evidence regarding her employment. She said that she has not worked since 2014 and has been in receipt of a disability pension since 2014/2015. She said she is paid at the single rate as her husband, the visa applicant, has not yet arrived in Australia.
15. The sponsor gave evidence that she lives alone in a Ministry of Housing property and has done so for some 6/7 years. She said she pays \$99 or \$100 dollars a fortnight in rent and buys \$50 utility cards. These are her main expenses. She told the Tribunal she had some \$28,000 in savings and received a Superannuation payout of \$60,000 in May 2015 when she turned 55. She said she regularly sends money to the applicant in the sum of \$250 a fortnight for his support and that of his daughter.
16. The parties gave an almost identical account of having first met at the applicant's sister's home when the applicant was visiting in 1994 for a month. However they were only ever with family when they met. The sponsor claims to have been separated from her husband at the time. The applicant's sister Ms Batto gave evidence that the sponsor's first husband had met the applicant in 1994 as he and his then wife the sponsor came on outings such as picnics with the family. She then retracted this evidence indicating she was unsure about it. The sponsor gave evidence that she had separated some 4 times from her first husband and was undergoing a separation in 1994 when the applicant was visiting Australia. The applicant claims such personal matters as whether the sponsor was married were never discussed.
17. They parties each claim that whilst the applicant's sister Emina was Skyping the applicant in 2012 the sponsor walked past and was spotted by the applicant. He then inquired about her. When she returned home she said he had skyped her.
18. The Tribunal finds the account of how the parties met by chance as she walked past the applicant's sister on Skype somewhat implausible. The meeting was some 18 years after the applicant had a 1 month holiday in Australia. Questioned about the Skyping and the equipment they used to Skype each other in 2012 both gave vague unconvincing responses. The sponsor claims the parties got to, know each other on Skype from 2012 to 2014. The sponsor believed she was using a laptop, in the Dell brand to Skype. She said it broke down and she threw it into the rubbish. She said she then used a phone. She said unfortunately her phone was stolen and so she purchased another before her trip to Macedonia to marry in March 2014. Significantly there is no independent evidence that any such claimed communications between the parties reflecting the development of the relationship took place. The Tribunal has grave concerns regarding this.

19. The applicant said he asked the sponsor to come to Macedonia to discuss a marriage. This she did in November 2013. They met in person, became engaged and the sponsor returned home a month later in December 2013.
20. The evidence is that the sponsor returned to Macedonia in March 2014 and stayed for some 3 months. This trip coincides with the time she claims to have left her work and commenced to receive a disability pension. The parties had a civil marriage. The sponsor gave evidence that the applicant is a religious person. His sister Ms Batto explained that the parties have as yet not had a marriage in accordance with the applicant's Islamic faith and that the parties intend to do this when he comes to Australia.
21. Since the marriage the sponsor has taken 3 further trips to Macedonia; the first in November 2014 staying one month and travelling home with the applicant's mother who had arrived a short time ahead of her. Her next trip in May 2017 she accompanied her mother in law to and back home from Macedonia; she again travelled with her mother in law in October 2018 returning on 20 November 2018 a month later.
22. The sponsor gave evidence that on each trip she stayed at the home of the applicant.
23. Other evidence was given regarding the sponsor's work. She herself gave evidence that she shares the care of her mother in law with the applicant's sister Emina. The sponsor's evidence is that Emina is in receipt of a carer allowance for this and that she is not. The applicant's sister Ms Batto gave inconsistent evidence saying that the sponsor works looking after the applicant's mother. She said this is her work most of the time. She did not know if anyone received a carer's allowance in relation to this. However she volunteered that the sponsor's own mother, who has been unwell, has a girl who is her carer and who looks after her. The sponsor claimed that her care for her own mother is a reason that she has not been able to spend more time in the last 4 years with her husband.
24. Asked if she knew of the applicant's plans if granted a visa Ms Batto replied that he would come to Australia and that the sponsor could look after their mother and her husband. She said the family has lots of land and that the applicant will sell as soon as he knows he has the visa. She said he will come and buy or build a house to make it easy for their mother and he would live there with their mother and the sponsor.
25. The sponsor gave evidence that the applicant's mother lived alone. The visa applicant gave inconsistent evidence saying clearly that his mother lives with his sister Emina.
26. The sponsor claimed she first met the applicant's sister Emina when giving a friend a lift. The friend was with the Emina and had no lift so the sponsor drove her home and she and Emina became friends. Ms Batto gave inconsistent evidence regarding how her family first met the sponsor. She said the sponsor first came to know the family as she met the applicant's brother who lives here some 37 or 38 years ago, she thinks at soccer. She said she and the sponsor's first husband and the applicant's family socialised together.

Whether the parties are in a spouse or de facto relationship

27. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.
28. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must

be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

29. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other in a civil ceremony on 12 June 2014 under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).
30. The Tribunal whilst accepting the parties are legally married records it has serious concerns as to the reliability of the evidence of inception and development of the relationship.

31. Are the other requirements for a spouse relationship met?

32. Financial aspects of the relationship

33. The sponsor gave evidence that she and the applicant have no joint assets. However she claims that in 2015 she had a Superannuation payout in the sum of \$ \$70,000. She said she gave the applicant \$15,000 for repairs to his house in Macedonia. She said as well she sends him \$250 a fortnight. Asked if this came out of her disability pension she replied it did. Asked what the applicant earns the sponsor said he gets his mother's Macedonia pension and the money she sends him. Asked if his mother also gets an Australian pension, she replied yes.
34. The sponsor gave evidence of land ownership explaining that her husband owns land and that his mother has given it to them. She submitted a document headed "Present of Land" in support of the claim. She said this letter was written in Australia. It is in English and is witnessed by a Notary. The Tribunal has carefully reviewed the document and finds it is not a legal document rather, if anything, a note of intention. The Tribunal formed the view that the letter was provided for the purpose of suring up the visa application.
35. At the hearing the applicant claimed inconsistently that his only income is what the sponsor sends him. Asked then about his mother's Macedonian pension, he replied that his sister in Macedonia gets it. Asked about the land, the applicant gave evidence that he owns some land together with his brother and that his sisters also own some of the family land. The Tribunal notes in other evidence the applicant previously said, inconsistently, that he relies on the sponsor for himself and his daughter as well as his mother's pension.
36. The applicant was asked about his statement in his application that he worked as a farmer. In response to this he said that he is not working his land because economic circumstances in the village are difficult. In other evidence he said that he takes care of the family farm but it is not a primary source of income.
37. The sponsor gave evidence that she purchased a car for the applicant. She said she did this before she received her Superannuation payout. She said she paid for it out of savings. She said she had some \$28,000 in savings at the time. The Tribunal has grave concerns as to

the truth of the reasons for the sponsor claiming to have purchased a car in the applicant's name. She said she did this for his and her use when she is in Macedonia. However the Tribunal notes she has had little use of the vehicle as since she purchased the car, on her own evidence, she has only spent two months in Macedonia. The Tribunal formed the view that any car purchase was for the purpose of strengthening the visa application.

38. Whilst there is evidence of the sponsor funding house repairs for the applicant and purchasing a car and regular payments from her pension the Tribunal is unable to be satisfied in all the circumstances that the sponsor send the money in good faith because she and the applicant are in a genuine and continuing spousal relationship. The Tribunal notes the balance of settled family members of the applicant in Australia and other evidence given by the applicant that his brother in Australia assists him. The Tribunal is not satisfied that the applicant and his daughter are dependent on the sponsor as claimed or that the monies in question are being used as claimed. The Tribunal finds no evidence the parties share any other financial commitments or responsibilities. There is little evidence of future financial planning. The Tribunal is unable to be satisfied on the financial evidence there it is supportive of a genuine and continuing spousal relationship in all the circumstances and inconsistencies of this application.

39. *The nature of the household*

40. The parties have provided some photographic material showing them in household situations during the period that the sponsor has been overseas when it is claimed that she lived in the applicant's family home. Photos have also been submitted which purport to show repairs to the applicant's home. The Tribunal has given careful consideration to these.
41. Some 12 neighbours of the applicant have provided signatures to a document indicating the parties cohabited in Macedonia. The Tribunal places limited weight on this evidence.
42. Since 2013 when the parties spent a month together the longest visit of the sponsor was 3 months in 2014. She visited a second time for a month in 2014 and in 2017 for a month and in 2018 for a month, visiting at the same time as her mother in law. Given her evidence that she has not worked since marrying the applicant the Tribunal asked why the sponsor had not spent more time with the applicant. The Tribunal does not accept her responses reflect a genuine and continuing relationship. Whilst her own mother may be unwell, there is evidence her own mother has her own carer. And whilst she is caring for the applicant's mother and has married children with families of their own none of this explains why some arrangements were not made for her to be with her new husband awaiting the processing of the visa for longer periods.
43. The Tribunal notes that on the three trips since her marriage to the applicant the applicant's mother has also been visiting her son in Macedonia. The Tribunal also takes into consideration that the sponsor is a carer for the applicant's mother. The Tribunal notes the evidence of Ms Batto that the sponsor is the main carer of the applicant's mother and formed the view that that the evidence is supportive of the sponsor's role as the carer for the sponsor being with the applicant's mother on her last two trips. The Tribunal accepts the parties have lived under the same roof but is unable to be satisfied that this is evidence of a genuine and continuing spousal relationship in all the circumstances of this application.
44. Furthermore apart from vague evidence concerning buying or building a house in Australia there is no reliable or convincing evidence that the parties have discussed or made plans with regard to establishing a joint household in Australia such as would be expected particularly from mature adults and where an 18 year old secondary applicant needs to be considered.

45. Having carefully considered all the evidence individually and as a whole the Tribunal is not satisfied that the parties' living arrangements since their engagement and marriage point to the parties having lived together as spouses in a genuine and continuing relationship. This is particularly so as when asked about her hobbies and likes the applicant replied that his wife "likes spending time" with him.

46. *Social aspects of the relationship*

47. At the hearing the sponsor gave clear evidence that she had provided photographs in particular of the wedding. No such photographs appear to have made their way to the Tribunal.
48. The Tribunal has considered the photocopied photographs showing the parties together and with other unidentified people.
49. Form 888 sworn declarations have been provided by close family members of the applicant including family in Australia. The Tribunal has considered these and all the sworn documents provided supporting the relationship. However after some 5 years the Tribunal would have expected that declarations from a wider group of people without vested interests could have been provided. The Tribunal gives some weight to family and close friend's evidence but finds there is limited independent supporting evidence of the relationship being widely socially recognized as would be expected given the claimed length of the claimed relationship.

50. *The nature of the parties' commitment*

51. At the hearing the applicant displayed a serious lack of knowledge of the sponsor's living arrangements in Australia in that, from his evidence, he was unaware that she was living in a Ministry of housing property. As she has lived there for some 6/7 years, the whole period of her relationship with the applicant, the evidence is concerning. The parties claim regular and lengthy communications but that claim is not supported in relation to this matter.
52. The applicant and the sponsor claim that they remained in contact during their periods of separation from 2014 via Skype and Viber. They provided evidence of this claimed contact in the form of untranslated messages and Viber screen shots for a limited period from December 2014 to January 2015. The Tribunal finds the account of how the parties met up after 18 years somewhat implausible. The Tribunal finds the evidence regarding the claimed Skyping and the equipment they used to Skype each other in 2012 vague and unconvincing. Significantly there is no independent evidence that such communications took place.
53. The Tribunal has considered the more recently submitted pages of Viber screen shots and untranslated messages but finds in all the circumstances it is insufficient to demonstrate regular and ongoing communications sufficiently convincing to establish that the applicant and sponsor have maintained a genuine spouse relationship, as claimed while living apart in separate countries for a significant period of time.
54. On the basis of the above the Tribunal is not satisfied that the requirements of s.5F (2) are met at the time the visa application was made and or the time of this decision.
55. Therefore the visa applicant does not meet cl.309.211 and/or cl.309.221.
56. For the reasons above, the visa applicant does not satisfy the criteria for the grant of the visa.

DECISION

57. The Tribunal affirms the decisions not to grant the visa applicants Partner (Provisional) (Class UF) visas.

Mary Urquhart
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in sub regulation (3).
- (3) The matters for sub regulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in sub regulation (2), the Minister may consider any of the circumstances mentioned in sub regulation (3).